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December 17. 1767.

A N S W E R S

F O R

Margaret Clark, and David Frazer her husband, and
Simon Frazer of London, their indorsee,

T O

The PÉTITION of Duncan Clark merchant in
Rotterdam.

WHEN a cause is much involved in facts, and in different processes, it is not difficult, by an artificial confusion, to create an appearance of difficulty in it. A petition so framed must always procure an order for an answer, from judges who cannot know what passed in the outer house with regard to it. But when the facts are stated in a fair and regular order, the cloud disappears. The present cause is an instance of the truth of these observations. The justice of the Lord Ordinary's interlocutor, which gave the question with expences for the respondent, will best be supported by the following state of facts. For to be decided in the way the Lord Ordinary has done, the cause needs only to be understood.

Daniel Clark merchant in South Carolina died there, in the year 1756, in opulent circumstances. The petition, p. 1. acknowledges he was worth L. 6000 or L. 7000 Sterling; but in fact he was worth more. He left no issue. His nearest
A relations

relations were, Alexander Clark of Inverness, his brother; Elisabeth, his sister; and the respondent Margaret, his niece by a deceased sister. At his death there was found lying by him a will, whereby he left a legacy of L. 2000 Sterling to his brother Alexander, L. 300 Sterling to his relation Alexander Clark at Castle Stewart, and L. 200 Sterling to the respondent Margaret his niece: but without any destination of the rest of his estate; so that by the statute of distributions of the English law, which behoved to regulate his succession in America, the residue of his estate fell by equal portions amongst Alexander his brother, Elisabeth his sister, and the respondent his niece. Thus the respondent's share, besides her legacy of L. 200, was, even upon the petitioner's supposition, L. 1500.

By the said testament, the defunct had named Lauchlan Macgilivrae, of that country, his administrator; and Lauchlan intromitted universally with his effects.

Alexander Clark went to Carolina in the year 1758, in order to ingather his brother's effects; and, before he went, applied for, and obtained from the respondent an assignation to her legacy of L. 200, upon his obligation to be accountable for it when recovered.

Before Alexander Clark left Scotland, he received considerable remittances from Macgilivrae the administrator. When in Carolina he received, partly from Macgilivrae himself, and partly from him by bills upon London, above L. 4000 Sterling; and also an obligation to make good to him L. 1200 more. These sums the respondent knows of for certain; but has reason to believe, that he received likewise other sums, or security for them: and the fact appears by copies of letters produced by Alexander Clark in this process.

When Alexander returned to Scotland, he concealed from his sister Elisabeth the extent of the funds he had recovered, and imposed upon her so far as to get her to accept of L. 12,000 merks, in lieu of her interest in the common fund.

Having

Having thus imposed upon his sister, his next attempt was to do the same to his niece, the respondent; and he refused to pay her her legacy of L. 200, unless she discharged him of all her interest in the residuary funds. But she being advised, that she had a right to one third of the subject, demurred till she should be made better acquainted with the amount of his recoveries. Upon this he refused to give her any light, and told her, she should never get a penny for either legacy or residue.

This unjustifiable conduct obliged the respondent to bring an action against him, in the year 1760, in this court, for payment of her legacy, and of L. 2000, as her third share of the subject.

On this dependence, the respondent inhibited Alexander Feb. 20. 1762 Clark in the year 1762.

The cause continued before the late Lord Justice-Clerk, while he lived. In the course of it, Alexander produced an account betwixt him and Lauchlan Macgilivrae; in which he owned remittances and payments to the extent of L. 4048:12:9 Sterling. And the Lord Ordinary, of this date, gave an interim decret for L. 180, as part of the legacy June 28. 1763 of L. 200; and remitted to the clerk of court to make out a state of the accounts, upon the plan of these remittances and payments; and on the other hand, of the payments made by him. But Alexander was so litigious, that he obliged the respondent to extract an interim decret, and do diligence up- Feb. 22. 1762. on it, before he would pay the above L. 180.

Some time after the above interlocutor was pronounced, the agents and parties had a meeting, in the month of June 1763; where it was agreed, from the funds acknowledged by Alexander Clark to be in his hands at that time, that the respondent was then intitled to L. 643:9:10; therefore a writing, partly an agreement, and partly a submission, was entered into betwixt the parties, of this date. By July 8. & 20. 1763. the agreeing part of it, Alexander Clark owns himself immediate

mediate debtor to the respondent, and David Frazer her husband, in the sum of L. 643 : 9 : 10 Sterling. And with regard to her claim for the rest of her share in the defunct's estate, he further agreed, " That the said Margaret Clark
 " and her husband shall be intitled to a third of the free
 " residue of the moveable and personal estate which be-
 " longed to the said Daniel Clark the time of his death, as
 " the same still remains in the hands of the said Lauchlan
 " Macgilivrae, or others the executors, administrators, and
 " intromitters with the said Daniel Clark's effects, or as
 " the same will be found to have been already received by
 " me the said Alexander Clark, or that I shall receive before
 " pronouncing the decreet-arbitral to follow hereupon, or
 " be otherwise found liable in, in the course of the submis-
 " sion after mentioned." And in the submitting part, they
 refer to two lawyers, therein named, "*the extent and amount*
 "*of what further third share belongs* to us the said Mar-
 garet Clark and David Frazer, of the foresaid effects and
 personal estate of the said Daniel Clark, whether the
 same remains in the hands of the said Lauchlan Mac-
 gilivrae, and others, the executors of the said Daniel
 Clark, or in the hands of me the said Alexander Clark, or
 shall come into my hands, or that I shall be found liable
 in before pronouncing the decreet-arbitral to follow here-
 upon." They also refer to the arbiters fundry other claims
hinc inde which they had on each other, with regard to Daniel
 Clark's succession.

The security given for this L. 643 : 9 : 10, which it was
 July 8. 1763. agreed the respondent was intitled to, was a bond of this
 date, by Alexander Clark, for the said sum, to David Frazer
 the respondent, as husband to Margaret; and for further se-
 curity thereof, Alexander Clark assigned to David Frazer two
 debts due by Dallas of Cantra, amounting, betwixt them,
 to L. 250 Sterling; and likewise an heritable bond, due by
 Macintosh of Farr, for L. 400 Sterling. But as Alexander
 Clark

Clark pretended, that he had not Farr's heritable bond and infestment then to deliver, he obliged himself to do it betwixt and Martinmas following.

Here it merits your Lordships attention, that at this meeting of the doers of the parties, in the house of John Mackenzie of Delvin writer to the signet, where this interim sum of L. 643 odd money is acknowledged due by Alexander, and this bond and assignment for security of it granted, the petitioner, who, as your Lordships will find in the sequel, was an exceeding proper partner for Alexander Clark, attended as a friend and adviser to Alexander.

But at this very time Alexander and the petitioner had combined together, to disappoint the effect of the assignment by Alexander of Farr's heritable bond to the respondent. Alexander having been resolved to assign Farr's bond to the petitioner, had pretended, in his assignment, that he had it not by him, and obliged himself to deliver it at the Martinmas following. But this was merely pretence, to deceive the respondents: for within a few days of the said agreement, Alexander assigned to the petitioner this very bond of Farr's for L. 400, which Alexander had already assigned to the respondent; and then, with all haste, Duncan the petitioner got himself infest upon it.

When the above bond by Alexander to the respondent, for L. 643 : 10 : 9 $\frac{1}{2}$, became payable, the respondent found, that Farr's said heritable bond, assigned the respondent in security, was again assigned away to Duncan Clark, and infestment passed on it; by which the respondent was disappointed of the effect of that assignment.

The respondent David Frazer, husband to Margaret, being justly provoked at this imposition, and finding that he could make nothing of the assignment to Farr's bond, registered Alexander's bond, containing the assignment to Farr's bond, and charged Alexander Clark for payment of the L. 643 : 10 : 9 $\frac{1}{2}$. Of this charge he presented a bill of sus-

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pension;

Nov. 1763. pension; but which was refused. Then the respondents took out caption against him, and also raised and used arrestments, and also an inhibition of this date.

In order to prevent the effect of this diligence, and to satisfy the respondent, there was a meeting betwixt Alexander Clark and him, on the 17th February 1764, where it was agreed, that Alexander, after allowance given him of the two debts due by Dallas of Cantray, also assigned in security as aforesaid, should grant a bill on Mess. Hanson Clark and Company, merchants in London, for the balance of L. 643 : 9 : 10 unpaid, being L. 377 : 14 : 1 in favour of the respondent; and upon the other hand, that on this bill's being paid, the respondent should discharge Alexander Clark of his bond for the L. 643 odd money, and of his assignation; together with the diligence which had followed upon the bond and assignation. This was accordingly done: For, of this date, Alexander Clark drew a bill upon Mess. Hanson Clark and Company for that sum, in favour of the respondent; and, of the same date, the respondent granted the following obligation to Alexander Clark; which, as it shows the *res vere gesta*, and is only partially quoted in the petition, shall be here recited at length. “ I David Frazer, tenant in
 “ Culchlachy, hereby grant and acknowledge me to have received from Alexander Clark tacksman of Geddes, the said Alexander's bill or draught on Mess. Hanson Clark and Company, merchants in London, for L. 377 : 14 : 1 Sterling,
 “ payable ten days after date; which bill or draught bears this very date: and as the said Alexander Clark has satisfied Duncan Grant writer as to any expence incurred at this quarter, in the execution of the fundry diligences at my instance against him; and that he has, by his letter of reference, addressed to our mutual arbiters at Edinburgh, obliged himself to account for and pay to Mr John Frazer writer to the signet at Edinburgh, the expences he might have been at in raising using and executing the said diligence, &c. ; that being done, and the forefaid duly honoured, I hereby promise and oblige me to
 “ deliver

“ deliver up to the said Alexander Clark the extract, registered
 “ bond, and assignation, granted by him to me and my spouse,
 “ with all the steps of diligence that has followed, or might
 “ follow thereupon, and an ample acquittance and discharge
 “ of the premises, agreeable to the advice and opinion of the
 “ said Mr John Frazer; which discharge to be made out by
 “ him, at sight, and to the liking of Mr Robert Donaldson wri-
 “ ter in Edinburgh. In witness whereof,” &c.

There is also in process a scroll of this discharge, made out in terms of this obligation, but which writing was never executed. This scroll, after a narrative of the transactions betwixt the parties, contains the following clause. “ Therefore wit ye us to
 “ have exonerated and discharged, as I the said David Frazer,
 “ with advice and consent of my said spouse, and I the said David
 “ Frazer as taking burden upon me for her, and both of us, with
 “ one consent and assent, by these presents exoner, quit claim,
 “ and *simpliciter* discharge the said Alexander Clark, his heirs, ex-
 “ ecutors, and successors, under the reservations after mentioned,
 “ of the foresaid principal sum of L. 643 : 9 : 10, as contained
 “ in, and due by the foresaid bond, granted by the said Alexan-
 “ der Clark to us, and of the penalty therein contained, and of
 “ the said bond itself, and haill diligences following thereupon,
 “ for now and for ever; and likewise of the foresaid assignation
 “ in security, granted by the said Alexander Clark to us,” &c.

The merit of the chief scope of the petition turns upon the obligation upon the respondent by the first of these papers: for it must be agreed, that nothing is incumbent upon him, further than as he is obliged by it. Therefore here it merits your Lordships attention, that the only thing which the respondent is taken bound by these writings to do, is to deliver up to Alexander Clark Alexander's bond for L. 643 : 9 : 10, of date 8th July 1763, and Alexander's assignation, of the same date, to Farr's bond, and the steps of diligence that had followed upon them; together with an acquittance and discharge of that bond, and that assignation, and the diligence thereupon. This observation,
 the

the truth of which cannot be contested, if the words and meaning of the obligation are attended to, will obviate the chief drift of this petition.

When the bill for L. 377 : 14 : 1 was presented to Mess. Hanson Clark and Company, they refused to honour it, on this account, that Alexander Ross of Carolina, factor for Alexander Clark, and who remitted them L. 800 of the defunct's estate, received from Lauchlan Macgilivrae in Carolina, whereof the sum in the bill was a part, wrote them to part with no more of that money, as he was at that time threatened with a claim against him from said Lauchlan Macgilivrae, as guarantee for the defunct, to the extent of L. 500. The consequence was, that upon Hanson and Clark's refusing the bill, it returned with protest, and the expence of re-exchange upon the respondents, to the extent of above L. 19.

Aug. 27. 1764. Upon this second disappointment, and the respondent's insisting to have redress for it, Alexander Clark, and his associate the petitioner, desired to have a meeting of friends upon the subject : which accordingly was held on this date, and the petitioner was present. Upon this occasion Alexander Clark offered to draw a new bill for L. 377 : 14 : 1, upon Hanson Clark and Company, in the respondent's favour. But as the respondent expressed a doubt whether that bill would be accepted of more than the former, the petitioner offered to write a letter to Hanson and Clark, as warrantee for Alexander, that their answering Alexander's draught should bring no inconvenience upon them ; or if it did, that he should relieve them. Upon this offer the parties closed. Alexander drew the bill upon Hanson Clark and Company, and the petitioner wrote them a letter, the obligatory part of which is in these words : " Therefore, to satisfy
 " all concerned, I hereby furthermore become surety with and
 " for the said Duncan Macintosh, and Alexander Clark, who is
 " more materially concerned in the premisses, for the extent of
 " the bill drawn upon you, of this date, being L. 377 : 14 : 1.
 " (Signed)

“(Signed) *Duncan Grant*. Dated, *Inverness*, 27th August
“ 1764.”

But as Alexander Clark and the petitioner had formerly combined together to strip the respondent of the security acquired by Alexander's assignment to Farr's debt; so they now, either again combined together to strip him of the security acquired by the bill upon Hanson and Clark, or the petitioner alone, attempted to do it: for though the bill, by Alexander upon Hanson Clark and Company, and the petitioner's letter of warrandice to Hanson Clark and Company, were at this meeting delivered to the respondent, and by him forwarded; yet, by the very same post, the petitioner wrote a private letter to Hanson and Clark, withdrawing his warrandice, and forbidding them to pay the bill. However the present petition may mince the matter, the petitioner's withdrawing his warrandice was fairly owned by himself in his memorial to the present Lord Ordinary, at p. 42. of his memorial, in the following words. “ The memorialist indeed
“ agreed to indemnify Mess. Hanson and Clark, to the ex-
“ tent of L. 377 : 14 : 1 Sterling, then drawn for; but as
“ they insisted for his security to the extent of the L. 500, he
“ did not chuse to become bound for so much; and was accor-
“ dingly obliged to withdraw his warrandice; upon which
“ they refused the bill.” Here the petitioner confesses he withdrew his warrandice, though he says it was not till some time after. But Hanson and Clark's copy-book of letters can easily ascertain the fact, if the petitioner will controvert it.

The consequence of this game was what was naturally to be expected: for when the respondent Frazer indorsed Alexander's bill to the other respondent Simon Frazer, and Simon Frazer presented it to Mess. Hanson Clark and Company, they refused payment; not because they had no funds in their hands, but because they thought themselves not safe to pay them away, after the petitioner's private letter; and the

consequence of this refusal again was, that the bill was returned.

It is generally observed, that honesty is the best policy. These actions were attended with their common consequences: Alexander, who from nothing had returned with L. 6000 or L. 7000 to his own country, became insolvent, or at least stopped credit, and has ever since lived in the hills; and his friend the petitioner thought proper to go to Holland, where he now is.

However, even in this condition, after the petitioner had, in this manner, disappointed the respondent, both of the assignment to Farr's bond, and of the fund in the hands of Hanson and Clark, he attempted to give the finishing stroke to his work by endeavouring to secure this last fund to himself. For this reason, he, of this date, got a bill from Alexander Clark upon Hanson Clark and Company, for the very identical sum of L. 377:14:1, payable to himself. How he patched up this debt, as due to him by Alexander Clark, is not certainly known; though it is certain, that, of the same date, he gave a bill to Alexander for a considerable sum: but that the end aimed at was, to disappoint the respondent of the security of the first and second bill, is obvious from this, that the bill in favour of the petitioner is for the identical same sum with the bill in favour of the respondent; and this last bill in favour of the petitioner, he, with matchless confidence, made his title in the multiple-poining hereafter to be mentioned. Words and deeds cannot express a more determined and barefaced collusion betwixt Alexander and the petitioner, to strip the respondent, for a second time, of the security which Alexander had granted, and which the petitioner had to appearance advised him to grant; and in the last of which the petitioner was a warrantee, but afterwards feloniously withdrew his warrandice.

Hanson Clark and Company conceiving, very justly, suspicion

suspicion from this strange procedure, refused payment of the petitioner's bill.

In this situation, the respondent was obliged to bring the two following processes, to make his money effectual, besides continuing his original process of count and reckoning against Alexander. His first process was a reduction against Alexander, executed of this date, of the assignation by Alexander Clark to the petitioner of Farr's heritable bond; which bond your Lordships have heard had been previously assigned in security by the petitioner to the respondent. A. Jan. 19. 1765.

This reduction came before Lord Auchinleck; who, of this date, remitted it to the original process of count and reckoning; and which original process had been transferred to the present Lord Justice-Clerk, upon the death of his predecessor in office. The other process was a multiple-poining, which the respondent, after the reduction, raised in name of Hanson and Clark, calling all parties having interest to debate upon the sum in their hands; particularly the said Alexander Ross. This multiple-poining came before Lord Gardenston; who remitted it likewise to the said original process. The petition says, the respondent was at great pains to keep these processes before different Ordinaries. They were remitted regularly, one after another, and the respondent never made the least opposition to it. Aug. 2. 1766.

Your Lordships will pardon the respondent for repeating an enumeration of these three processes, and for calling your attention with precision to the different objects of them.

The first was the count and reckoning, which the respondents had raised in the 1760, against Alexander Clark, to account for *all* the funds of Daniel he had intromitted with, and concluded for L. 200 of legacy, and L. 2000 of share and share alike, to be paid by Alexander to the respondent Margaret, as her share. The next was a reduction against Alexander of Alexander's assignment of Farr's bond to the petitioner, as
granted

granted to the prejudice of the respondent's prior assignment to the same bond. The object of it was, to make the respondent's assignment to Farr's bond good, and thereby to effectuate payment to the respondent of the balance yet unpaid of the L. 643 : 14 : 10, due by Alexander; in security of which Alexander had assigned Farr's bond to the respondent. The last was the multiple-poining, in the name of Hanson and Clark, the holder of the common fund of division; and the respondent's compearance in it was in order to make good the protested bill for L. 377 : 14 : 1, drawn by Alexander upon Hanson and Clark, in her favour. But it never was her intention, by these two last processes, both to be reinstated in the voluntary assignment to Farr's bond, and to obtain a preference for the L. 377 : 14 : 1 at the same time : for as she had got the bill, on a condition that she should discharge the assignment and Alexander's bond for L. 643 : 9 : 10, in security of which the assignment had been granted, provided she recovered the bill; so she was always willing, if she recovered the L. 377 : 14 : 1 from Hanson Clark & Company, to discharge Alexander's bond, and Alexander's assignment. But then, on the other hand, as the petitioner insisted, that he was preferable on his bill of L. 377 : 14 : 1, and made it his title in the multiple-poining, so she intended, if she could not recover her money from Hanson and Clark, to make good by the reduction her assignment to Farr's bond, and thereby to recover her money.

These causes having been remitted, as your Lordships have heard, to the present Justice-Clerk, the nature of them were stated in summer 1766 to his Lordship. Upon this occasion; the petitioner endeavoured to create confusion, by mixing the three processes; and to create a delay, by insisting that they should all be conjoined, and that the same interlocutor should serve for all. The plain meaning of which was, that the respondent should get no judgement, either upon the money

money in Hanson and Clark's hands, or upon the assignment of Farr's bond, granted to her prejudice, until the issue of the count and reckoning against Alexander Clark; the issue of which, like all other count and reckonings, and especially with such a party, was quite uncertain. But that the respondents might not be both intangled and delayed in this manner, they declared, that they were at present only to insist for a preference upon their interest in the multiple-pounding. Upon which the present Lord Justice-Clerk Ordinary, pronounced the following interlocutor, on the 2d of August 1766, " Appoints the competitors in the multiple-pounding " to give in mutual memorials upon their respective interests, " and that betwixt and next calling."

Thus the interlocutor confined the memorials to the competition in the multiple-pounding; and therefore, in obedience to it, the respondent gave in a memorial confined to his right of preference in the multiple-pounding: but the petitioner gave in a memorial of forty-three pages, shuffling all the causes together; and, though the memorial was in his own name only, insisting they should jog on in company. With regard to the reduction of Alexander's assignment of Farr's bond to the petitioner's prejudice, the prayer of the petitioner's memorial is in the following words: " That in case " you are disposed to prefer Margaret Clark in the multiple- " pounding, you will at same time dismiss the process of re- " duction; and find, That the pursuers have no right or " title to insist therein, or at least, that the pursuer cannot " be preferred in the multiple-pounding, without discharging " that process."

Of this date, the Lord Ordinary pronounced the following July 1. 1767.
interlocutor. " Having considered the memorial for Marga-
" ret Clark, and David Frazer her husband, and Simon Fra-
" zer their indorsee, and also the memorial for Duncan Clark
" merchant in Rotterdam; finds Mess. Hanson Clark and
" Company, raisers of the multiple-pounding, liable in once
D " and

“ and single payment; and prefers the said Simon Frazer up-
 “ on the funds in the hands of the raiser of the multiple-
 “ poinding, for payment to him of the principal sum of
 “ L. 377 : 14 : 1 Sterling, and interest due thereon, contained
 “ in the bill drawn by the said Alexander Clark upon the
 “ said Mess. Hanson Clark and Company, bearing date the
 “ 17th of February 1764, indorsed to the said Simon Frazer,
 “ and protested at his instance for not payment; and decerns
 “ in the preference, and for payment, accordingly. And in
 “ regard it appears, that the said Duncan Clark, being in the
 “ knowledge of the above bill, drawn by Alexander Clark
 “ upon Mess. Hanson Clark and Company, did afterwards
 “ elicit from the said Alexander Clark a second draught up-
 “ on the said Mess. Hanson Clark and Company, for the
 “ same sum, and thereby gave occasion to the raising of this
 “ multiple-poinding, and to the competition which has ensued
 “ thereupon; therefore finds the said Duncan Clark liable for
 “ the expence of the multiple-poinding, and also for the ex-
 “ pence of process incurred by the said Simon Frazer in dis-
 “ cussing his preference; and ordains an account thereof to
 “ be given in: And finds, That the said Margaret Clark and
 “ her husband, are not obliged, *in hoc statu*, to discharge their
 “ process of reduction against the said Duncan Clark, for re-
 “ ducing the assignation to the heritable bond due by Mac-
 “intosh of Farr: reserving nevertheless to the said Duncan
 “ Clark his defences against the said reduction, and also to
 “ insist for absolvitor from the said reduction, upon his show-
 “ ing that the said Margaret Clark and her husband have
 “ no further interest in the said bond.”

Nothing could be more reasonable than this interlocutor.
 The Lord Ordinary gives a preference in the multiple-poind-
 ing to the respondents, which he could not avoid, because
 their bill was prior in date, and protested twelve months be-
 fore the petitioner's; but because the respondent had not been
 heard upon the merits of the reduction, seeing she had, in o-
 bedience

bedience to the interlocutor of 2d August 1766, confined her memorial to her interest in the multiple-poin ding, he refused at that time to give a judgement upon the reduction ; but at the same time allowed the petitioner to have the reduction removed, in case he could show the respondent had no interest in Farr's bond.

However, the petitioner, instead of submitting to the former part of the interlocutor, and taking advantage of the latter, preferred a representation of twenty-five pages ; in which, though the representation was still only in his own name, and though he had no interest in the original process, he renewed his demand, that all the three processes should be conjoined. With regard to the reduction, he went a step further than he had done in his memorial. In his memorial he had prayed, That if the respondents was preferred in the multiple-poin ding, they should be obliged to discharge the process of reduction. He now insisted, that they should be obliged also to discharge Alexander's assignment to the respondent of Farr's bond. The words of the prayer on this head are, " *2do*, To
 " find, That Margaret Clark and her husband cannot be pre-
 " ferred on their bill to the sum in the hands of Mess. Han-
 " son and Clark, unless they shall at the same time comply
 " with the terms of their obligation, and discharge their as-
 " signation to the heritable bond on the estate of Macintosh
 " of Farr."

As the respondents imagined the petitioner was fighting a man of straw, and did not suspect that he wanted any thing further than he spoke out, they not only agreed to this, but also agreed, upon getting their money from Hanson and Clark, to deliver up Alexander's bond for L. 643 : 9 : 10, and his assignment to the respondent of Farr's bond in security of it. The words of the answers to the representation are, p. 8.
 " The purport of the transaction, as set forth in the represent-
 " ers obligation to Alexander and Duncan Clarks letter, is
 " no more than this : That the representer [it should be re-
 " spondent]

“ spondent] shall deliver back to Alexander Alexander’s bond
 “ to him, and Alexander’s assignment of Farr’s bond to him;
 “ and the respondent has no objection to your Lordships finding,
 “ that the respondent must deliver them back, as soon as he
 “ receives the money from Hanson and Clark.”

July 31. 1767. The Lord Ordinary, of this date, pronounced the following interlocutor. “ Having considered this representation,
 “ with the answers thereto, refuses the desire of the representation, and adheres to the former interlocutor: But finds,
 “ That upon payment by Hanson and Clark of the contents
 “ of their bill, as decerned for, David Frazer is bound to deliver up the bond granted by Alexander Clark to David Frazer and his wife, for L. 643 : 9 : 10 Sterling, with the assignation to Farr’s bond in security thereof, and haill diligence following thereon, and to discharge the same, in terms of the said David Frazer’s obligation to the said Alexander Clark in that behalf.”

Against this interlocutor, which gave the representer more than he asked, for it obliges the respondent not only to deliver up Alexander’s assignment to Farr’s bond, but also Alexander’s bond itself, and the whole diligence which followed upon either, and to discharge the bond itself, the petitioner represented. The strain of his argument was, to shew, that the respondent was obliged to discharge all title to Farr’s heritable bond. The prayer of the representation was in these words:
 “ To find, That Margaret Clark, and her husband, cannot
 “ be preferred in the multiple-poiding, without at the same
 “ time discharging all right and title to the heritable bond,
 “ not only in consequence of the assignation, but also in consequence of the inhibitions.” As the Lord Ordinary had already, on the respondents consent, ordained the respondents to deliver up Alexander’s bond, and Alexander’s assignment to Farr’s bond, and the diligence upon them, and to discharge Alexander’s bond, this demand appeared very extraordinary: it was besides so ambiguously expressed, that it seemed

seemed only in other words to desire a renewal of the former interlocutors. The Lord Ordinary, of this date, refused the representation without answers. Aug. 10. 1767.

The petitioner, against these interlocutors, or rather it is supposed against the last of them, complains to your Lordships; and now at last he speaks out what it is supposed he pointed at in his last representation; for after making his demands, inch by inch, in his memorial and first representation, he now makes a good stride indeed, and insists, that the respondent should discharge his inhibition 1762.

Your Lordships having ordered the petition to be answered: the respondents shall do it in the order of the prayers of it.

First, The petitioner prays, that the respondent should be obliged to discharge the process of reduction, and all right and claim of every kind which they may pretend to have to Farr's bond; or, *2do*, Otherwise that they shall not be intitled to a preference in the multiple-poiding.

With regard to this demand, when the petitioner desires the respondent should discharge every claim, of every kind, which he may have to the heritable bond, he desires the court to strike a stroke in the dark; and therefore the nature of his demand, which he affectedly conceals, must be explained to your Lordships.

Upon the original process of count and reckoning, against Alexander Clark solely, and with which the petitioner had nothing at all to do, the respondents inhibited Alexander in the year 1762. In consequence of this, they can void every conveyance which the inhibition can reach, made by Alexander to their prejudice. If your Lordships should discern the respondent Margaret, and her husband, to discharge the inhibition 1762, you would take from them the aid of the only certain protection they have for near L. 2000, with many years interest upon it, which Alexander yet owes them; and you would disable them to get justice against Alexander for assigning away a fund of their payment, to

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wit Farr's bond, to the respondent. And in the same way, if you oblige the respondent to discharge the present reduction, this will virtually oblige her to discharge the inhibition 1762; because the reduction is in fact founded upon it. The reduction goes on two grounds: 1st, That both Alexander Clark and the petitioner, the one in granting, and the other in taking said assignation, acted feloniously, and *contra fidem*, as both were in the knowledge of the prior assignment; and, 2^{dly}, That Alexander stood inhibited in the 1762 by the respondent, and therefore could not assign to the respondent a few days after the meeting in July 1763.

Now, so far as the reduction is founded on the first of these heads, the respondent has no objection to discharge the reduction; but so far as it is founded on the last of them, she cannot consent to it.

Such being the object and the consequence of the petitioner's demand, and such the state of the dispute betwixt the parties, the respondent apprehends the petitioner's demand ought not to be granted, for the following reasons.

1^{mo}, The respondent is under no obligation to discharge any thing, except so far as arises from his obligation granted to Alexander Clark, in the month of February 1764. Beyond the letter of that obligation he is not bound an Jota. The respondent has quoted the obligation itself, and even Mr John Frazer's scroll of the discharge agreed on, at full length, that the court may judge what the respondent is bound to do upon getting payment of the bill upon Hanson and Clark. He is obliged, by the obligation in February 1764, to do the following things: *To deliver up to Alexander Clark his own bond for L. 643 odd money, and his assignation to Farr's bond, granted in security of what was unpaid of it; and to discharge the steps of diligence that followed on his bond, namely, his charge, his caption, his arrestments, and his inhibition 1763, together with a discharge of Alexander's bond, and of Alexander's assignment of Farr's bond.* And again, what he would

would have been bound by the formal extension of that obligation to do, if it had taken place, would have been, *To discharge Alexander's bond, and the baill diligence following thereon, and the assignation to Farr's bond.* But this is quite a different thing from an obligation to discharge the inhibition 1762, and the consequences which it may have; the inhibition 1762 being a piece of diligence subsisting before either the bond by Alexander Clark, or the reduction made of the petitioner's right, subsisted. There is no such thing expressed in either of the papers; and therefore courts of justice are not at liberty to create obligations in the papers which the party who signed them has not expressed. The end of writing is, to prevent courts from framing wills for men by proofs and presumptions, and to obtain of courts to enforce the obligation, so far as it is declared, but not to frame one where it is not declared.

2do, As the obligation which the petitioner contends for is not contained in the letter of the writing, so as little can it be supported by the supposed meaning of parties. Alexander Clark had granted a voluntary security to the respondent, to wit a bond, and an assignment in aid of it. In place of this, he granted a new voluntary security, to wit the bill on Hanson and Clark. Upon this exchange, it was natural and consequential, that the respondent should discharge the first security, so far as it was a voluntary one; but that he should be obliged also to overgive and surrender any aid which the law might give him, to reach any of the subjects of Alexander, was not natural, and is not to be presumed. After the respondent had thus reinstated Alexander in Farr's bond, it fell to be open to the law of the land; and it is not easily to be presumed, that the respondent would have consented to relinquish the aid of the law for the future, and which all the other lieges have.

It is not to be supposed, that two persons settling their affairs together should make a condition, which was to hurt
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one of them to excess, in order to serve a third party, who was no party to the settlement. If the respondents had quitted their inhibition, she quitted a security for above L. 2000. The only process then subsisting betwixt the parties now in the field, was the count and reckoning betwixt Alexander and the respondent, with which the petitioner had nothing to do. For it merits your Lordships attention, that the petitioner did not interpose his credit at all with Hanson and Clark in February 1764; it was not till the settlement of 27th August thereafter that he did so; and it will not be supposed, that in a partial settlement relative to that dispute, the respondent would have parted with a general security, and that too in order to favour a party with whom he had no concern, and who had formerly grossly abused him.

And as there is no reason to believe, that such an indulgence was granted by the petitioner; so there is very good reason to believe, that it was not granted. The respondent's debt exceeded both Farr's bond, and the money in Hanson and Clark's hands, many times over. The respondent stood in need of all the funds of Alexander that she could reach, instead of giving up any of them. By a partial transaction, she had consented to take part of the money due to her, out of one fund, *to wit*, Farr's bond; but it being convenient, both for Alexander and her, that she could get payment out of another fund, *to wit*, the money in Hanson and Clark's, she consented to take it out of that second fund; but is it to be supposed, that Alexander could have asked, or that she would have granted, to annihilate the first fund altogether, and to disable herself at any after period to reach it, for the remainder of the debt which was due to her? *Quoad* the part of the debt that was in the interim and immediately to be paid, *to wit*, the balance of the L. 643 odd money, she consented not to take payment out of a fund allotted for the payment of it, and took another in its place, which could be
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turned into money in a few days; but by consenting to avoid taking this partial payment out of one of the particular funds which Alexander had, it cannot surely be imagined, that she consented to make him a present of that fund to himself, and to quit using the diligence of law afterwards upon it, if there should be a deficiency for satisfying the more extensive claim which the respondent had; and which, as your Lordships have heard, would have exhausted both the funds in dispute, many times over.

In this view, though the case in hand seems to be involved in circumstances, and to be a special case, yet in reality it becomes to be a very general one, and the doctrine contended for by the petitioner, if sustained, would set a precedent of a very extensive and dangerous nature. A creditor inhibits his debtor; afterwards at a settlement the debtor agrees to make a partial payment, and assigns a partial fund for it; afterwards the debtor desires the creditor to take his payment rather out of another partial fund; the creditor consents, and reassigns the first fund, and discharges what diligence he had done upon it after the date of the assignation, but does not discharge the prior and original inhibition. Then, upon the petitioner's doctrine, the debtor might insist, that the creditor had made him a present of the first fund for ever, which the creditor, though unpaid of ten times his general debt, was not to reach, either by after diligence, or upon his prior inhibition.

Nor is it any objection to the arguments made use of for the respondent, that, from the respondent's using her inhibition 1762, the petitioner will suffer a consequential damage. The petitioner had nothing to do with the count and reckoning betwixt the petitioner and the respondent. The respondent used on it an inhibition, which it was her right to use; and as long as she has not discharged that inhibition, she may use it against her debtor, whatever consequential damages may arise therefrom to a third party.

It is pleaded for the petitioner, That the submission discharged

charged the original process of count and reckoning, and consequently the inhibition 1762, which was raised on it.

It is answered, The petitioner might as well plead, that the dependence of the process itself, discharged itself, and the inhibition upon it: for a submission, whilst it lasts, creates a dependence as much as the process in place of which it comes.

But as this argument is utterly untenible, the petitioner, to help it out, says, That the process of count and reckoning was discharged by a private transaction, at the time that the submission was signed.

It is answered, There is not the most distant evidence of it, and the allegation is a mistake in fact.

It is pleaded for the petitioner, That the respondents acceptance of the assignment to Farr's bond, was a discharge of the original process of count and reckoning.

It is answered, This argument is rather more untenible than the former, if any thing can be more so. The respondent's claim in the count and reckoning was for L. 2200 Sterling: is it to be believed, that for L. 643 : 9 : 10, she would have discharged a sum of near four times its value? The whole *res vere gesta* shows, that the settlement on the 8th July 1763, was a partial, not a general one.

Another argument of the same kind is used in the petition, to wit, That the L. 643 : 9 : 10 was Margaret's full share of the effects of her uncle; and that therefore, when she receives the balance of this sum, by getting payment of that balance from Hanson and Company, she will receive payment of every penny due to her.

It is answered, The very first page of the petition confutes this fact. It is there acknowledged, That Daniel Clark left betwixt L. 6000 and L. 7000 Sterling behind him; that his legacies were L. 2300, independent of the legacy of L. 200 due to the respondent; and that one third of the residue, together with her own legacy of L. 200, was due to the respondent :

dent: so that her claim, instead of being L. 643 odd money, was, upon the petitioner's own supposition, about L. 1700; and the petition acknowledges, p. 3. that the bond for L. 643 : 9 : 10 was for the share that had, *at that time*, been recovered; and that the submission related to what *further might be claimed*.

The petitioner seems to plead, That the reduction, so far as supported by the inhibition 1762, ought to be discharged, because he interposed his credit to obtain a discharge of the reduction. He does not attend, that this argument is founded on an anachronism: he interposed his credit on the 27th August 1764, and the reduction was not executed till the 19th January 1765.

It is pleaded for the petitioner, That the respondent David Frazer's intention to discharge the inhibition 1762, is proved by his letter to the petitioner, wrote at the time when the petitioner interposed his credit with Hanson and Clark for Alexander Clark, in favour of the respondent, to wit, on the 27th August 1764.

The respondent little expected the petitioner would have chosen to have the transaction of the 27th of August brought above board, as it is a most ugly one for him: and his conduct, in counteracting the very security he gave, and for which he says, the pretended discharge intended by this letter was returned, strips him of all right to found upon that letter.—The history of the transaction shall be stated to your Lordships. The petitioner having offered to be warrantee for Alexander, in his draught on Hanson and Clark, wrote thus to these gentlemen, on the 27th August. “There-
“fore, to satisfy all concerned, I hereby furthermore be-
“come surety with and for the said Duncan Macintosh and
“Alexander Clark, who is more materially concerned in the
“premisses, for the extent of the bill drawn upon you, of
“this date, being L. 377 : 14 : 1 Sterling.”

Of the same date, and on the same sheet, the respondent wrote the letter to the petitioner, now founded on in the petition,

tion, in the following words. “ Sir, As you have granted
 “ the above letter for the purposes mentioned, and in order
 “ to give me access to the above sum, I hereby promise and
 “ oblige me, That neither I or my heirs, &c. shall trouble
 “ or recur on you, for or on account of any share or inter-
 “ est otherwise due or competent to me, in or to that sum of
 “ L. 377 : 14 : 1 Sterling money.” — *To Mr Duncan Clark
 merchant in Inverness.*

And on the same sheet of paper, and at the same time, Alexander Clark wrote the following letter to the petitioner.
 “ Sir, I hereby become bound and engaged to free and in-
 “ demnify you at all hands, for and to the extent of L. 377,
 “ 14 s. 1 d. Sterling, for which your letter on my account
 “ to Mess. Hanson Clark and Company, with all that may
 “ or can follow thereupon; and I continue, Sir, your affu-
 “ red friend, [Signed], *Alexander Clark.*”

But the petitioner, immediately after writing the above letter to Mess. Hanson & Clark, and receiving the above letters, the one from the respondent David Frazer, and the other from Alexander Clark, did, by that very post, write privately to Hanson & Clark, withdrawing that very warrandice contained in the first letter, in consideration of which, the two last letters had been granted; so that in this transaction he was imposing both on Alexander his friend, and on the respondent, whose payment he was pretending to facilitate.

At the time this bill reached London, the petitioner thought proper to write again to Mess. Hanson & Clark, not to have any dependence on his foresaid letter of warrandice, as security to him for the money, and discharged them to accept the draught, or to pay any part thereof. A copy of this letter was transmitted by Mess. Hanson & Clark to John Frazer, in a letter, of date the 4th of October 1764; and are both herewith given in. In which last, these gentlemen say, That in regard of Duncan Clark's said letter, they could not
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act otherwise than they did; that is, than to refuse accepting the bill.

From this state of the transactions, two satisfying answers arise to the petitioner's argument on this head.

In the *first* place, The respondent's letter to the petitioner refers only to the right to Farr's bond, so far as acquired by the assignation. The respondent had got an assignment to Farr's bond from Alexander Clark. It was transacted betwixt Alexander and the respondent, that the respondent should quit that assignment, upon getting a more immediate fund of payment. The restitution of the assignment was the only thing *de quo quærebatur*, or *de quo transigebatur*; and therefore the respondent's letter to the petitioner must be limited to the restitution of the assignment alone; because the respondent's previous transaction with Alexander Clark was limited to the restitution of that assignment alone, as is plain from the respondent's obligation to Alexander Clark, and the scroll of the discharge made out in consequence thereof, both above mentioned. The letter from the respondent to the petitioner is not to be interpreted to be broader, or to extend further, than the transaction betwixt Alexander Clark and the respondent, to which it related.

But, *2dly*, Supposing this letter had been ever so broad, and that it had contained a complete obligation upon the respondent to discharge totally the inhibition 1762, the petitioner has lost all right of founding upon, or taking advantage of it, by withdrawing that very warrandice, in consideration of which it was granted. A man cannot take advantage of an obligation granted to him, in consideration of one granted by him, when he withdraws the obligation granted by him.

The petitioner complains, that the respondent does not go on with his count and reckoning against Alexander. This is none of his business. The respondent was stopped

two years by the submission, and the petitioner has stopped her since, by locking up her funds by this late suit.

The petitioner, in the *last* place, reclaims against the costs of suit, and modestly asks costs of suit for himself.

A very few words will be needed in answer to this part of the petition. At the transaction 8th July 1763, where Alexander granted the assignment to Farr's bond, the petitioner was present as the friend and adviser of Alexander Clark; he got Clark to make a sham that he had not Farr's bond at hand; and therefore, instead of delivering it up, to grant only an obligation for delivery of it: And yet, after advising Alexander in public to grant the assignment to the respondent, he in a few days after, in private, took an assignment to himself; whereupon he was infest, and by that means cut the respondents out of so much of their security. Again, in the transaction of 27th August 1764, he was present as the friend and adviser of Alexander Clark. In order to facilitate the payment of the bill which Alexander drew on Hanson and Clark, in favour of the respondent, he interposed his own credit; and yet that same day imposing both upon his friend and the respondent; he privately withdrew that credit. Thereafter, in order to carry off even the fund which he had officiously pretended to secure for the respondent, he procured from Alexander Clark a bill for the exact identical sum, payable to himself, which he had pretended he intended should be paid to the respondent. By this variation and confusion of measures, he was the cause of Hanson and Clark refusing to pay that money to the respondents, which they would otherwise have paid long ago to them. And to crown all, he with excess of assurance produced this his bill in the process of multiple-poinding, and made it his title in that action, insisting for a preference that was absolutely untenable. In the conduct of his right in the process, he endeavoured to produce a new confusion, by mingling three processes together, to two of which he was not
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so much as a party. He made his demands inch by inch, in order to spin out the litigation; and by these various means he has kept the respondents out of their money from the 8th July 1762, when he first meddled betwixt Alexander Clark and the respondents, down to this day. The respondent founds on these few capital facts, as sufficient to intitle her to the expences which the Lord Ordinary, who had the best opportunity of observing the conduct of the cause, gave her. Was there occasion for it, the respondent could condescend on several others.

It is said in the petition, That the respondent has recovered her money from Hanson and Clark. But this is a mistake. By the petitioner's embroiling matters, the money lay dead in Hanson and Clark's hands from February 1764 to May 1766, without paying interest. This was a loss to all parties. The respondent's agent desired his brother, who is a merchant at London, to take up the money at L. 4 *per cent.*; and both granted their security to Hanson and Clark for it, and obliged them to return the money, or to procure Hanson and Clark fully exonerated; and the money still lies at 4 *per cent.* for behoof of the respondents, who have never touched a penny of it.

It is said in the petition, That the respondents "most anxiously concealed every paper which could tend to throw light upon their private transactions with Alexander Clark; and that he has been obliged to force every one of them from them, by a diligence granted by the Lord Ordinary: That this conduct was not only highly improper, and even vexatious, but their anxiety to conceal the particulars of these transactions, and shut out the light, show their consciousness, that these transactions, if clearly explained, would defeat their own plea."

This is truly astonishing. One would think that the respondent had concealed trunkfuls of papers, or the petitioner recovered cart-loads of them. The fact is, the respondent has

has no papers to produce, and the petitioner recovered nothing except the scroll of the discharges above recited, made out by John Frazer in consequence of the respondent's communing in February 1763. Mr Frazer never dreamed that his private paper could be of use to any body, or that it was his duty to throw it into process unasked; but the moment it was called for, he produced it on the diligence; and now that it is produced, it clearly defeats the petitioner's argument founded on, at least does in no sort better him.

There are many things thrown out in the petition, of which no notice is taken in the present answers; and the reason is, that as they are calculated to withdraw the attention of the court from the principal object, the respondents think an answer is not expected by your Lordships.

It is therefore hoped your Lordships will adhere to the Lord Ordinary's interlocutor, with the addition of the expence of the present answers to the expence he has found due.

In respect whereof, &c.

JOHN DALRYMPLE.







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